

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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TIMOTHY PUCKETT,

Plaintiff,

Case No. 1:08-CV-326

v.

Hon. Robert J. Jonker

CHUNG (first name unknown),

Defendant.

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**ORDER AND JUDGMENT**  
**APPROVING REPORT AND RECOMMENDATION**

The Court has reviewed the Magistrate Judge's Report and Recommendation (docket # 4), and Plaintiff's "Response in Opposition" (docket # 5). The Court will treat the Response in Opposition as an Objection to the Report and Recommendation. Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 381 (2d ed. 1997). Specifically, the Rules provide that:

The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Court has reviewed de novo the claims and evidence presented to Magistrate Judge Brenneman; the Report and Recommendation itself; and Plaintiff's Objection. After its review, the

Court finds Magistrate Judge Brenneman's Report and Recommendation to be both factually sound and legally correct. The Report and Recommendation recommends that Plaintiff's complaint be dismissed for failure to state a claim because the facts alleged by Plaintiff suggest, at most, a claim of misdiagnosis or excessive medical treatment, not a constitutional claim of deliberate indifference that satisfies the test of *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Plaintiff's objection offers nothing but a short recapitulation of arguments already presented to the Magistrate Judge and fully addressed in the Report and Recommendation. As explained in the Report and Recommendation, plaintiff's allegations fail to rise to the level of deliberate indifference under the constitutional test. This Court agrees upon de novo review.

**ACCORDINGLY, IT IS ORDERED** that the Report and Recommendation of the Magistrate Judge (docket # 4) is **APPROVED AND ADOPTED** as the opinion of the Court.

**IT IS FURTHER ORDERED** that Plaintiff's complaint is **DISMISSED** for failure to state a claim. The dismissal of this action counts as a strike for purposes of 28 U.S.C. § 1915(g). The Court finds no good-faith basis for appeal within the meaning of 28 U.S.C. § 1915(a)(3).

Dated: August 29, 2008

/s/ Robert J. Jonker

ROBERT J. JONKER

UNITED STATES DISTRICT JUDGE